IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPLICATION No. 1892 of 2007.

Mr Dharmesh Nitin Shah ..Applicant.

Vs.

The State of Maharashtra ..Respondent.

Mr S. R. Pasbola with Mr Bharat Khanna,
Advocates, for the Applicant.

Ms S. D. Shinde, A.P.P for the State.

CORAM: V. C. DAGA,J.
DATED: 14.08. 2007.

P.C.:-

1. Heard Mr S. R. Pasbola, learned counsel assisted by Mr Bharat Khanna,Advocates for the applicant-accused and Ms S. D. Shinde, learned APP for the State.

2. Perused application and material available on record.

3. This is an application for bail under Section 21 (4) of the Maharashtra Control of Organised Crime Act, 1999 ("the M.C.O.C.Act" for short) read with Section 439 of the Code of Criminal Procedure, 1973 ("the Cr.P.C". for short).

FACTUAL MATRIX :-
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4. The factual matrix, in short, is that

C.R. Nos. 86 and 87 of 2005 are registered for the offences under Sections 384, 385, 386, 387, 34 read with Section 120 (B) of the I.P.C. read with Section 3 (1) (ii), 3 (2), 3 (4), 3 (5) of the Maharashtra Control of Organised Crime Act, 1999 (for short "the M.C.O.C. Act") with D.C.B. C.I.D. C.I.U. (Operation), Mumbai.

5. In brief, the case of the prosecution agency is that there exists an organised crime syndicate headed by one Chhota Rajan,wanted accused. That such organised crime syndicate and members thereof have threatened various professionals, including builders to extort money from them. Such threats were administered through telephonic calls.

6. The prosecution case is based on two F.I.R.s registered, at different times, with two different Police Stations, but if the entire case is seen, it does not relate to one or two incidents. It is the case of the prosecution that there are number of such instances of administering threats to the professionals, builders, etc., as a part of the continuing unlawful activities undertaken by the said organised crime syndicate.

7. During the course of investigation, appropriate permission from the Competent Authority was sought to intercept certain telephonic conversations. The intercepted conversations were found to be between the persons who had threatened and the persons who were being threatened. Some of such conversations appear to be between the accused themselves i.e. between two or more persons of the organised crime syndicate, itself.

8. So far as the applicant is concerned, there is an allegation against him that he is an active member of the said organised crime syndicate. It is alleged that he takes part in the activities of the organised crime syndicate. That he engages services of young boys to carry out activities of the syndicate. That he is in touch with various other members of the organised crime syndicate. That he passes on information to the other accused persons that is now according to the prosecution, applicant runs organised crime syndicate. His implication is based on the certain intercepted conversations said to be between him and one Vicky Malhotra, who is also one of the accused in custody.

ORAL SUBMISSIONS:-
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9. The learned counsel appearing for the applicant submits that the applicant is innocent and has not committed any offence as alleged by the prosecution. That the Investigating Agency has not brought forward any material on record to connect the present applicant with the commission of the offences alleged against him. That no material is available on record to establish identity of the applicant as "Nanhu" . That intercepted communications allegedly between the applicant and the other accused cannot be relied upon as the said communications were not intercepted following provisions of Section 14 of the M.C.O.C.Act.

10. Per contra, bail application is opposed by the State. Counter affidavit duly affirmed by one Sayyad Mobin, Assistant Commissioner of Police is filed. In that affidavit he states that during the course of investigation, it was revealed that the present applicant Dharmesh Nitin Shah @ Nanhu is involved in the offences registered against the accused Vicky Malhotra, Farid Ahmed Tayyab Tanashah and Chhota Rajan. That he is a member of

organised crime syndicate. That during the course of investigation, it is revealed that the applicant is the same person, who is also known by his nick name "Nanhu", who was found to be in constant contact with the main accused Vicky Malhotra on mobile phone. That he is carrying out illegal activities for pecuniary gain. This assertion is based on the conversation between him and Vicky Malhotra which was intercepted with due permission.

11. Learned A.P.P. submits that during the course of investigation, voice samples of the said applicant were taken. They were sent to the Central Forensic Science Laboratory (C.F.S.L.) for the purpose of examination and to seek opinion so as to establish identity of the voice in the relevant conversations. As per prosecution, opinion received indicates that the voice found, was that of caller stated to be "Nanhu" which matches with the voice of the present applicant. In other words, intercepted conversations in question, matched with the voice of the applicant, collected by way of speech samples during the course of investigation.

12. It is also the case of the prosecution that print record of the mobiles used are also part of the investigation record.

13. It is further stated that, during the course of investigation, the co-accused John Albert D'souza has voluntarily made confession before Assistant Commissioner of Police that the present applicant is member of crime syndicate of Chhota Rajan, which according to the prosecution is admissible piece of evidence under the provisions of the M.C.O.C.Act. It is also a case of the prosecution that considering the material available with the approval of the competent authority the provisions of Section 3(1) (ii), 3 (2), 3 (4), 3 (5) of the M.C.O.C.Act were applied. The investigation was taken over by Shri.R.M. Pargunde, A.C.P.D-1, (Special) DCB, CID, Mumbai.

14. The applicant-accused, during the jail custody had filed Application No. 14 of 2006 for bail under Section 439 of the Cr.P.C. in M.C.O.C. Special Case No. 25 of 2005 and 25-A of 2005 which came to be rejected on 14.3.2007 for the following reasons:-

A) That there is material to show the existence of an organized crime syndicate and of their continuing unlawful activities.

B) That is some material to suggest that one "Nanhu" is also said to be the member of the said organised crime syndicate, who is, apparently, in contact with and in touch with the accused no.1 in this case.

C) The investigating agency claims to have ascertained the identity of the applicant as the same "Nanhu", during the course of investigation by various methods.

D) During investigation, an expert has opined to the effect that the voice claimed to be of the said "Nanhu" and that of the applicant, collected by way of sample is of the same person.

E) Considering the type of offence, the likelihood of the investigating agency being able to secure a more reliable and concrete material, cannot always be expected; and ordinarily, when the case would depend on the intercepted conversations between two members of an organised crime syndicate, the major material that would be available to connect the applicant, would only be the opinion of an expert about the identity of voice.

15. After having failed to obtain bail, the accused has, now, invoked jurisdiction of this Court, contending that there is no material to suggest that the applicant was or is engaged in any continuing unlawful activity or that the applicant has committed any offence of organised crime within the meaning of Sections 3 (1) (ii), 3 (2), 3 (4), 3 (5) of the M.C.O.C.Act,1999.

CONSIDERATION:
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16. Before considering rival submissions, it is necessary to turn Section 21 (4) of the M.C.O.C.Act, 1999:-

Section 21.

> "(4):- Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act, shall, if in custody, be released on bail or on his own bond, unless---
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> (a) the Public Prosecutor has been given an opportunity to oppose the application of such release; and
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> (b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
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> (5) Notwithstanding anything contained in the Code, the accused shall not be granted bail if it is noticed by the Court that he was on bail in an offence under this Act, or under any other Act, on the date of the offence in question.

17. The M.C.O.C.Act is a special legislation. No person accused of an offence punishable under this Act, if in custody,can be released on bail unless the Public Prosecutor has been given an opportunity to oppose the application of such release and where the Public Prosecutor opposes the application, the Court has to get itself

satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. Keeping the said provisions in mind, one has to examine whether or not prima facie material is available on record to reach to the prima facie; conclusion that the applicant is not guilty of the offence alleged and that he is not likely to commit any offence while on bail.

18. Having examined aforesaid legal position, it is not in dispute that the telephonic conversation between Mr Vicky Malhotra and the present accused were intercepted with due approval and as per the report of the experts, the voice of the present applicant matches with that of the person known as "Nanhu" who had conversation with Mr Vicky Malhotra, co-accused.

19. The eye witnesses have made the statements that the accused-applicant had threatened them for extortion purposes in their presence.

20. During the course of investigation, one of the co-accused John D’souza has made

confession before the Deputy Commissioner of Police that applicant-accused is a member of organised crime syndicate of Chhota Rajan, this confessional statement is admissible piece of evidence in the present case.

21. If the aforesaid evidence is proved or established in trial, then a possibility of conviction cannot be ruled out. Apart from this, once the person is released on bail being a member of organised crime syndicate as is found on the basis of prima facie material available on record, the possibility of committing further offences also cannot be ruled out. In this view of the matter, applicant cannot get bail.

22. In the result, application is rejected for the reasons recorded herein together with the reasons recorded by the learned Special Judge, M.C.O.C.,Mumbai in his order dated 14.3.2007.

(V.C. DAGA,J)